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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

RONALD ANTHONY BRIM,

Defendant and Appellant.

B260121

(Los Angeles County
Super. Ct. No. TA131884)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Patrick Connolly, Judge. Affirmed as modified.

Rachel Varnell, under appointment by the Court of Appeal, for Defendant
and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant
Attorney General, Lance E. Winters, Senior Assistant Attorney General, Susan Sullivan
Pithey and Amanda V. Lopez, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Ronald Anthony Brim appeals from a judgment after a jury convicted him of possessing a controlled substance while armed with a loaded and operable firearm, possessing a controlled substance for sale, and possessing a firearm as a felon. The jury also found true the allegation that Brim committed these crimes for the benefit of and in association with a criminal street gang. Brim argues that there is no substantial evidence to support the finding on the gang allegation and that the trial court committed prejudicial error by refusing to give a limiting instruction Brim had requested regarding use of a statement by Brim's co-defendant. We reject both arguments, concluding that there was substantial evidence to support the gang enhancement and that any instructional error was harmless. We agree, however, with Brim's final contention that the trial court erred by not staying execution of the sentences on two of his three convictions. Therefore, we affirm the judgment as modified.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Nickerson Gardens and the Bounty Hunter Bloods*

Nickerson Gardens, a public housing complex with over 1,000 units, is the center of activities of the criminal street gang Bounty Hunter Bloods, and where active members of the gang congregate. It is also home to a vigorous trade in controlled substances, and, according to one police officer, is "considered some of the most valuable real estate for . . . selling rock cocaine." At any time during the day or night, there are multiple locations within Nickerson Gardens where gang members are selling rock cocaine. Police officers commonly observe cocaine users there going in and out of locations where cocaine is sold.

The method of selling rock cocaine in Nickerson Gardens is unique. The kitchens in the units of the housing complex have a cutting board. The sellers display the cocaine in an "orderly fashion" on the cutting board, so that when purchasers come into the unit,

they can select “the actual piece of rock cocaine that they want” to purchase, like diners at a seafood restaurant selecting the lobster they want for dinner. The fact that buyers can select the rock they want is one of the reasons the cocaine business is so strong in Nickerson Gardens.

Police officers assigned to investigate Nickerson Gardens and the Bounty Hunter Bloods have learned that drug dealers have developed various methods to prevent officers from gaining access to units suspected of housing illegal activity, or at least to delay officers entering a unit. One of these methods is called bolting or pinning the doors, which in Nickerson Gardens are metal. Residents or others inside the units drill a hole several inches deep in the floor inside the unit next to the door, and place a bolt of metal, such as a piece of rebar, into the hole, which acts as a reinforcement and prevents someone from opening the door from the outside. When drug dealers bolt or pin the door in this way, it takes police officers five minutes to get past the bolt or pin using a hook or battering ram, which gives the individuals inside time to destroy evidence of drug sales.

Brim is an active member of the Bounty Hunter Bloods. He has a “B” and an “H” tattooed on his back. Travell Phillips, Brim’s co-defendant, is a member of the Family Swan Bloods criminal street gang. He has a large “F” and an “S” tattooed on his back. Members of the Family Swans generally do not go to Nickerson Gardens unless they are trusted, they have family members who live there, or they have permission or a “pass” from someone in the Bounty Hunters gang who vouches for them. Phillips has such a pass. He has family in the Bounty Hunters, he hangs out with Bounty Hunter gang members, and his mother lives in Bounty Hunters territory. Phillips also grew up in Nickerson Gardens, and is known and respected there.

B. Execution of the Search Warrant on Unit 350

On January 30, 2014, at approximately 1:30 p.m., a group of at least six officers, including Officer Manuel Moreno, Officer Jonathan Vander Lee, and Detective Erik Shear, approached Unit 350 of Nickerson Gardens from the back door to execute a search warrant. The officers chose the back door because they had observed purchasers of

controlled substances going in and out of the unit through that door, which made it more likely that it was not bolted or pinned. Detective Shear was the point man or lead on the search warrant, which meant that he was going to be the first one through the door. Officer Moreno, who had obtained a key from the housing authority in charge of Nickerson Gardens, was going to make the knock announcement, use the key to open the door, and then step aside so that Detective Shear and the other officers could enter the unit.

When the officers arrived at the back door, Officer Moreno, with Detective Shear on his left, unlocked the outer metal screen door with the key, and was about to knock on the inner door and give notice the officers were serving a search warrant, when an individual who appeared to be a buyer opened the door from the inside.¹ Officer Moreno pushed the door all the way open and saw Brim inside the unit, standing at the end of the countertop in the kitchen facing the door, looking at Officer Moreno, and “holding a revolver in his right hand” at his side and pointed to the ground. Then the door partially closed, and Officer Moreno heard a noise that sounded like Brim had “possibly tossed the gun into a drawer, because [Officer Moreno] heard what sounded like it was hitting cheap wood” As Officer Moreno described the event at trial, he saw Brim “for a split second with a gun in his hand,” then he lost sight of the gun and heard what he thought was the gun dropping into a drawer.

Officer Moreno was able to stop the door from closing with his arm. He pushed it back open, and moved out of the way so the other officers could enter the unit to serve the warrant and conduct the search. Detective Shear entered the unit first with his rifle in a “low ready” position, followed by six or seven officers with their guns drawn. As he entered, Detective Shear saw Brim and Phillips running back into the unit and away from the officers. Detective Shear and several other officers pursued. Phillips fell down at the

¹ The individual who opened the door exhibited signs of a chronic user of rock or base cocaine, such as unhealthy lips from using hot glass pipes, burnt fingertips, missing teeth, a disheveled and unkempt appearance, and body odor. Brim and Phillips did not have any of these symptoms or attributes.

base of a flight of stairs, and was arrested there, while Brim ran up the stairs. The officers pursued Brim and eventually arrested him in a bathroom upstairs, with \$200 in his possession.

Inside the unit, the officers found the cutting board “half full of rock cocaine,” a razor blade used to cut rock cocaine into \$20 and \$10 pieces (“the most common sale amounts for these kinds of street sales”) and \$5 pieces (called “\$5 pieces or chips”), a hole drilled in the floor by the front door with a piece of rebar in it, two scales in a kitchen cabinet above the stove, cash in small denominations (a few \$5 bills, some \$1 bills, and one \$20 bill) in a drawer near the counter top, and, in the same drawer, the loaded .357 Magnum revolver Brim had been holding. The rocks of cocaine were organized into rows of large and small rocks, ready for display and selection. Detective Shear testified at trial, in response to a lengthy hypothetical mirroring the facts of this case, that the “quantity and denominations of the pieces of rock cocaine readily available to sell to people coming in and out of the unit,” the presence of the firearm, the “pinned doors to prevent police from getting in and, hopefully, allowing the people inside a chance to destroy the evidence,” the scales “commonly used for weighing the pieces of rock cocaine,” the presence of a customer who appeared to be a chronic user of cocaine, and the flight of the suspects from the police and (in Brim’s case) up the stairs, were all consistent with individuals possessing rock cocaine with the intent to sell. The officers also recovered Brim’s cell phone, which had pictures of the “B” and “H” tattoos on his back and of Brim throwing Bounty Hunters gang signs.

Officer Vander Lee interviewed Brim and Phillips at the police station for approximately five minutes each. Phillips told Officer Vander Lee there was cocaine in the unit. Brim told Officer Vander Lee he had not been downstairs and had been in the bathroom the entire time.

Nikkie Walters lived in unit 350. She knew Brim and Phillips. One of her friends, who had a key to the unit, was dating Brim and was the mother of his child. Although she denied it at trial, Walters told Officer Vander Lee at the police station that she rented the unit to Brim and Phillips to sell drugs, and she received a portion of the profits, which

she used to help pay her bills. The People subsequently charged Walters with maintaining a dwelling for the purpose of selling drugs, to which she pleaded no contest.

C. *The Charges*

The People charged Brim with possession of a controlled substance while armed with a loaded, operable firearm (Health & Saf. Code, § 11370.1, subd. (a), count 1), possession for sale of a controlled substance (Health & Saf. Code, § 11351, count 2), and possession of a firearm by a felon (Pen. Code, § 29800, subd. (a)(1), count 5).² The People also alleged, in connection with counts 1 and 2, that Brim committed the offenses for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in criminal conduct by gang members. (§ 186.22, subd. (b)(1)(A).) The People also alleged that Brim had suffered one prior serious or violent felony conviction within the meaning of section 667, subdivision (a), and the three strikes law (§§ 667, subds. (b)-(j), 1170.12), and that he had served prior prison terms for felony convictions for burglary and possession of a firearm by a felon (§ 667.5, subd. (b)).

D. *The Gang Expert Testimony at Trial*

Officer Francis Coughlin, a 19-year officer with the Los Angeles Police Department who was serving as the senior lead officer in charge of curbing crime involving the Bounty Hunter Bloods in Nickerson Gardens, testified as a gang expert for the People. Coughlin testified that he had extensive knowledge about and experience with the Bounty Hunter Bloods, and estimated there were approximately 600 active members in the gang, most of whom congregate in and around Nickerson Gardens. He explained that “Nickerson Gardens is the hub of the Bounty Hunters’ activities,” although the gang has “sets” in the surrounding areas. Coughlin testified that crimes committed by members of the Bounty Hunter Bloods in Nickerson Gardens include robbery, drug sales,

² Undesignated statutory references are to the Penal Code.

weapons possession, shootings, and murders, and that gang members “profit tremendously” from the sale of rock cocaine. Coughlin knew Brim and Phillips, their respective gang memberships, and Phillips’s relationship with the Bounty Hunter Bloods.

Coughlin opined, in response to a lengthy hypothetical that mirrored the facts of this case, that Brim committed the crimes of possessing cocaine for sale and possessing cocaine while armed with a firearm for the benefit of the Bounty Hunter Bloods. Coughlin explained, “In my experience in Nickerson Gardens and investigating these gangs, there are a lot of consistencies with sales of narcotics. Here you have two documented gang members, one being from Nickerson Gardens, the Bounty Hunter Bloods, executing the sales of narcotics for profits You can see how the profits can be split amongst the two individuals inside, when gang members are splitting what sounds to be several hundred dollars recovered, and several hundred more on the board, . . . you can see how they can afford some of life’s necessities, as well as luxuries, without seeking employment.” Coughlin testified that the sale of cocaine “benefits the entire gang, especially in this case, Nickerson Gardens, where they conduct their . . . sales as an enterprise, where it’s a gang that employs literally hundreds of their members a year selling narcotics. There is always a location you can go to purchase the narcotics, and you always have a steady clientele that is going to purchase narcotics from you. With this narcotics enterprise you can see how . . . there is a constant flow of income coming from the neighborhood. When gang members are making money and they’re not working, they’re able to congregate in the neighborhood. Gangs, in part, tend to sustain themselves by creating an atmosphere of fear and intimidation in neighborhoods. They do that by robbing people, carrying guns, shooting people, [and] selling narcotics—crimes that shock people. And with its members not working, they’re able to congregate in that neighborhood, re-enforcing that fear and intimidation.” Coughlin added that, as a result, “people don’t want to come to court and testify against this gang or its members,” which “makes the gang members feel that they can operate their criminal enterprise without interference, and that benefits them greatly.”

Coughlin also opined that Brim committed the crime in association with the Bounty Hunter Bloods. Coughlin explained that there were “two gang members, one from Nickerson Gardens and one from the Bounty Hunter Bloods working in concert to execute the sale of narcotics for profit.” Coughlin testified that, if the police come, the two individuals can work together and divide responsibilities so that one of them can drop the bolt to prevent or delay the police from entering while the other can dispose of the cocaine before the police can gain access to the unit. When gang members work in concert, especially when they have a weapon, they decrease the possibility that someone will be able to rob them and take their money and their drugs.

E. *The Verdict and the Sentence*

The jury found Brim guilty on all three charges against him. The jury also found true the criminal street gang allegation for counts 1 and 2.³ Brim admitted his prior strike conviction for burglary, his prior conviction for possession of a firearm by a felon, and the allegation he had served prior prison terms for felony convictions within the meaning of section 667.5, subdivision (b).

The trial court sentenced Brim to eight years (the upper term of four years, doubled to eight years under the three strikes law) on count 1, plus three years for the criminal street gang enhancement under section 186.22, subdivision (b)(1)(A), plus five years for the prior serious felony conviction enhancement under section 667, subdivision (a). The court also sentenced Brim to concurrent terms on count 2 and on

³ Counsel for Phillips made a motion, in which counsel for Brim joined, to dismiss the gang allegation pursuant to section 1118.1, arguing that “everything that’s been presented has been pure speculation on the officer’s part.” The court denied the motion, stating, “I know that in other cases I’ve made a similar record. I think that a lot of this is speculation. But under the law, the expert is to opine based on his experience. And having laid a foundation, I think that has been done here.” It is unclear whether in stating, “a lot of this is speculation” the court was referring to the “other cases” the court had referenced or to this case.

count 5. The court imposed statutory fines, fees, and assessments, and awarded Brim presentence custody credits.

DISCUSSION

Brim argues that the People failed to prove the criminal street gang allegation because there is no substantial evidence that Brim committed the crimes for the benefit of or in association with the Bounty Hunters criminal street gang. Brim also argues that the trial court erred in refusing to instruct the jury with CALCRIM No. 305, as Brim had requested, and that the trial court erred in failing to stay the sentences on count 2 and count 5 under section 654. We conclude that substantial evidence supports the jury's finding on the criminal street gang allegation, that any error in refusing to give CALCRIM No. 305 was harmless, but that the trial court should have stayed execution of the sentences on counts 2 and 5.

A. *Substantial Evidence Supports the Jury's True Finding on the Criminal Street Gang Allegation*

“Section 186.22, subdivision (b)(1), enhances the sentence for ‘any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members’” (*People v. Livingston* (2012) 53 Cal.4th 1145, 1170; see *People v. Rodriguez* (2012) 55 Cal.4th 1125, 1138 [“[t]he enhancement under section 186.22(b)(1) punishes gang-related conduct, i.e., felonies committed with the specific intent to benefit, further, or promote the gang”].) The court “can impose the enhancement only if the prosecution establishes both of the following elements beyond a reasonable doubt: first, that the defendant committed a felony (a) for the benefit of, (b) at the direction of, or (c) in association with a criminal street gang; and second, that in connection with the felony, the defendant harbored the *specific intent* to (a) promote, (b) further, or (c) assist in any criminal conduct by gang members.” (*In re Daniel C.*

(2011) 195 Cal.App.4th 1350, 1358; see *People v. Albillar* (2010) 51 Cal.4th 47, 51; *People v. Gardeley* (1996) 14 Cal.4th 605, 615.)⁴

Brim argues only that the prosecution failed to establish the first element. Citing *People v. Ochoa* (2009) 179 Cal.App.4th 650, Brim argues that substantial evidence does not support the jury's true finding on the gang allegation because "the *only* evidence presented to prove the crimes were committed for the benefit of or in association with the Bounty Hunter Bloods was Coughlin's speculative testimony." (See *id.* at p. 657 ["[a] gang expert's testimony alone is insufficient to find an offense gang related"]; but see *People v. Vang* (2011) 52 Cal.4th 1038, 1048 ["[e]xpert opinion that particular criminal conduct benefited a gang' is not only permissible but can be sufficient to support the Penal Code section 186.22, subdivision (b)(1), gang enhancement"]; *People v. Albillar*, *supra*, 51 Cal.4th at p. 63 ["[e]xpert opinion that particular criminal conduct benefited a gang by enhancing its reputation for viciousness can be sufficient to raise the inference that the conduct was 'committed for the benefit of . . . a[] criminal street gang' within the meaning of section 186.22(b)(1)"].) Brim does not dispute that he was a member of the Bounty Hunter Bloods, nor does he challenge the jury's finding that he acted with the specific intent to promote, further, or assist criminal conduct by gang members.

We review a challenge to the jury's true finding on a gang allegation under section 186.22, subdivision (b)(1), for substantial evidence. (*People v. Garcia* (2016) 244 Cal.App.4th 1349, 1366.) "In considering a challenge to the sufficiency of the evidence to support an enhancement, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find

⁴ "[C]riminal street gang' means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated [in section 186.22, subdivision (e)], having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." (§ 186.22, subd. (f).)

the defendant guilty beyond a reasonable doubt. [Citation.] We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] "A reviewing court neither reweighs evidence nor reevaluates a witness's credibility." (*People v. Livingston*, *supra*, 53 Cal.4th at p. 1170.)

Although an expert on criminal street gangs generally may not testify whether the defendant committed a particular crime for the benefit of or in association with a gang, a gang expert may express an opinion, based on hypothetical questions that track the evidence, whether the crime, if the jury finds it occurred, was for a gang purpose. (*People v. Vang*, *supra*, 52 Cal.4th at p. 1048; accord, *People v. Ewing* (2016) 244 Cal.App.4th 359, 382; see *People v. Johnson* (2014) 229 Cal.App.4th 910, 921, fn. 34 ["testimony regarding gang culture and habits . . . is permissible in cases where the . . . gang enhancement is alleged"].) The gang expert's opinion can constitute substantial evidence supporting a true finding on the gang allegation if the hypothetical facts presented to the gang expert are "properly rooted in the evidence." (*People v. Ferraez* (2003) 112 Cal.App.4th 925, 930; see *People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1551, fn. 4 ["[a] gang expert may render an opinion that facts assumed to be true in a hypothetical question present [an] example of gang-related activity, so long as the hypothetical is rooted in facts shown by the evidence"].)

Coughlin gave his opinion, in response to a hypothetical question that tracked the evidence, that Brim committed the crimes for the benefit of the Bounty Hunter Bloods. Coughlin testified that, by obtaining proceeds of the drug sales, gang members like Brim were able to support themselves without working, which allowed them to congregate in Nickerson Gardens and the surrounding neighborhood. The cocaine sales benefited the gang by allowing its members to subsist without legal employment. Thus, selling cocaine in Nickerson Gardens allowed members of the Bounty Hunter Bloods to create and sustain an atmosphere in the neighborhood of fear and intimidation, which Coughlin

testified benefited the gang members “greatly.” It also ensured a steady stream of income from the neighborhood to the gang. (See *People v. Williams* (2009) 170 Cal.App.4th 587, 609 [“[e]xpert testimony is . . . relevant and admissible to explain how a gang benefits from drug sales”]; *People v. Ferraez, supra*, 112 Cal.App.4th at p. 930 [“the gang expert’s testimony was necessary to explain to the jury how a gang’s reputation can be enhanced through drug sales”].) Coughlin also testified that Brim committed the crimes in association with the gang because he was working in concert with Phillips who, although not a member of the Bounty Hunter Bloods, had permission or a “pass” from the Bounty Hunter Bloods to sell drugs in Nickerson Gardens.

Coughlin’s opinion was based on facts in the evidence. This evidence included the testimony of Detective Shear, who stated he had spent a good portion of his career “focused on, specifically, the Bounty Hunter Bloods and their narcotics trade in Nickerson Gardens,” and he had participated in several “long term investigations into the Bounty Hunter Bloods . . . mainly focusing on their narcotics trade.” Shear testified that the sale of drugs in Nickerson Gardens is an “extremely profitable . . . business, and the gang members in Nickerson Gardens do not let . . . just anyone come sell in there, because it takes profits away from them.” He testified that the Bounty Hunter Bloods gang was “wrapped up in” the drug sales in Nickerson Gardens, and Brim was a member of that gang. Shear testified that Phillips was a gang member who, although he was a member of the Family Swans gang, was working with Brim with the approval of the Bounty Hunter Bloods because no one can sell drugs in Nickerson Gardens without approval of the gang. He testified that during his 12 years in the division, whenever he investigated drug dealers in Nickerson Gardens, the investigation had always determined that they were members of the Bounty Hunters.

Coughlin, because he had personal knowledge of the Bounty Hunter Bloods and the gang’s operations at Nickerson Gardens, also provided some of the factual basis for his opinion. Coughlin was not an expert who had only reviewed the facts of the case and formed an opinion in response to a hypothetical question that Brim had committed the crimes for the benefit of or in association with the gang. Coughlin had extensive personal

experience policing and investigating the Bounty Hunter Bloods and crime at Nickerson Gardens. He testified from personal knowledge about the kinds of crimes the Bounty Hunter Bloods commit at Nickerson Gardens, the money that cocaine sales in the housing project brings to the gang, and the relationship between Brim, Phillips, and the Bounty Hunters. He explained that Brim was selling cocaine in the heart of Bounty Hunter Bloods' territory, and that individuals cannot sell cocaine without the gang's knowledge, permission, and approval. (See *People v. Hill* (2011) 191 Cal.App.4th 1104, 1121-1122 ["a gang expert may rely upon conversations with gang members, on his or her personal investigations of gang-related crimes, and on information obtained from colleagues and other law enforcement agencies"].)

Coughlin's opinion, combined with the other evidence, constituted substantial evidence to support the jury's true finding on the gang allegation. The extensive evidence of gang activity at Nickerson Gardens, the officers' testimony describing how the cocaine business operated at Nickerson Gardens and benefited the Bounty Hunter Bloods, the testimony that Phillips could only participate in selling drugs at Nickerson Gardens with the approval of the gang, the fact that Brim was convicted of two of the Bounty Hunter Bloods' primary crimes (cocaine sales and weapons possession) in the gang's territory, and Coughlin's fact-based opinion, constituted reasonable, credible, and solid evidence from which the jury could find that Brim possessed cocaine for sale while armed with a firearm for the benefit of and in association with the gang. (See *People v. Vang, supra*, 52 Cal.4th at p. 1048.)

Brim argues that, "because [he] and Phillips belonged to different gangs, it is unlikely that either would be acting to benefit the other's gang." Brim's argument is based on two incorrect premises. First, although as a factual matter Brim and Phillips belonged to different gangs, they were both Blood gangs that were not actively feuding at the time, and there was evidence suggesting that Phillips had not only the Bounty Hunter Bloods' trust, but also its permission to be present and sell cocaine in the heart of Bounty Hunters' territory. Second, as a legal matter, the issue is not whether it was "unlikely" that Brim and Phillips were committing crimes for the benefit of or in association with

the Bounty Hunter Bloods. (See *People v. Albillar*, *supra*, 51 Cal.4th at p. 60 [“[a] reviewing court neither reweighs evidence nor reevaluates a witness’s credibility”].) The issue is whether there was substantial evidence, viewed in the light most favorable to the judgment and presuming “every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence” (*ibid.*), to support the jury’s finding that Brim was acting to benefit or in association with the Bounty Hunter Bloods.

Brim also argues that there is no evidence “the Bounty Hunter Bloods received a cut of the profits,” and that Brim was selling cocaine, not for the benefit of or in association with the Bounty Hunter Bloods, “but instead because it was profitable to do so.” Direct evidence that a share of the proceeds went to the treasurer of a gang or was deposited into a gang’s bank account is not necessary to show that a gang member was selling drugs for the benefit of or in association with the gang. (See *People v. Carr* (2010) 190 Cal.App.4th 475, 489 [jury may rely on circumstantial evidence and expert testimony “to make findings concerning a defendant’s active participation in a gang”]; *People v. Ferraez*, *supra*, 112 Cal.App.4th at p. 930 [circumstantial evidence can support a finding that a crime was gang-related].) Indeed, the prosecution’s theory and Coughlin’s testimony was not that a portion of Brim’s sale proceeds went directly to the Bounty Hunter Bloods, but that the drug business conducted by Brim and other gang members allowed them to make money without leaving Bounty Hunter Blood territory for work, thereby maintaining the gang’s presence at Nickerson Gardens. Moreover, even if, as Brim argues, it is a reasonable inference from the evidence that Brim was selling cocaine to benefit himself and not the Bounty Hunter Bloods, it is also a reasonable inference that he was selling cocaine for the benefit of and in association with the gang, in which case there was substantial evidence to support the jury’s finding. (See *People v. Albillar*, *supra*, 51 Cal.4th at p. 60 [“[i]f the circumstances reasonably justify the trier of fact’s findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding”]; *People v. Vasquez* (2015) 239 Cal.App.4th 1512, 1517 [“[w]e must accept logical inferences that

the jury might have drawn from the evidence although we would have concluded otherwise”].)

Brim asserts there was no evidence that (1) “the sales were necessary for [Brim] to gain respect in his gang” or (2) “his business served to promote fear in the community.” (1) is true: The People did not present evidence that Brim was selling cocaine with a firearm to gain respect in the Bounty Hunter Bloods, even though committing crimes to gain respect is one way to act for the benefit of or in association with a criminal street gang. (See, e.g., *People v. Johnson* (2016) 62 Cal.4th 600, 612; *People v. Tran* (2011) 51 Cal.4th 1040, 1045; *People v. Galvez* (2011) 195 Cal.App.4th 1253, 1261). Seeking to gain respect, however, is not the only way to benefit a gang. (See *People v. Williams*, *supra*, 170 Cal.App.4th at p. 609 [drug sales]; *People v. Ferraez*, *supra*, 112 Cal.App.4th at pp. 930-931; *People v. Duran* (2002) 97 Cal.App.4th 1448, 1455 [gang expert testified that “[n]arcotics sales benefit a gang by providing a source of income for gang members”].) (2) is false: Coughlin explained how Brim’s cocaine sales promoted fear in the community by allowing gang members to congregate and create an atmosphere of fear and intimidation in and around the Bounty Hunter Bloods’ territory.

Similarly, Brim points out that there was no evidence he “did anything during the commission of the crimes to identify himself with the Bounty Hunter Bloods, such as wearing gang colors, flashing gang signs, calling out a gang name, or engaging in gang graffiti.” Again, these kinds of acts are indicia that gang members are acting for the benefit of and in association with their gang. (See, e.g., *People v. Livingston*, *supra*, 53 Cal.4th at p. 1171 [wearing color of the gang]; *Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 907, fn. 16 [graffiti]; *People v. Mendez* (2010) 188 Cal.App.4th 47, 57 [announcing the gang’s name]; *People v. Roberts* (2010) 184 Cal.App.4th 1149, 1191 [wearing gang colors and showing gang signs].) And the People did introduce into evidence a picture from Brim’s cell phone of Brim throwing a gang sign. But evidence of such conduct is not required for a true finding on a gang allegation. (See, e.g., *People v. Williams*, *supra*, 170 Cal.App.4th at p. 621.)

B. *Any Error in Failing To Instruct the Jury with CALCRIM No. 305 Was Harmless*

As noted, when Officer Vander Lee interviewed Phillips at the police station after his arrest, Phillips stated that there was cocaine in the unit. At trial, counsel for Brim asked the court to give CALCRIM No. 305, which would have instructed the jury, “You have heard evidence that defendant Phillips made a statement out of court. You may consider that evidence only against him, not against any other defendant.” The court refused to give the instruction, stating, “I know there was a statement by Mr. Phillips as to cocaine. I’ve looked at it to see. But he is percipient. I don’t believe that [CALCRIM No.] 305 is applicable here.”

Brim argues that the trial court erred in refusing to give CALCRIM No. 305. He argues that “[t]he instruction anticipates the exact situation here – where there are multiple defendants, one of whom makes an out of court statement that should only be considered against him.” The People appear to concede the error (although perhaps unintentionally) because they argue that Brim was not entitled to the instruction by stating, “Mr. Phillips’ statement that cocaine was in the apartment established knowledge of the substance’s nature or character as a controlled substance for purposes of Mr. Phillips only,” which is the very reason for giving the instruction.

The trial court’s failure to give CALCRIM No. 305, however, was harmless because there is no reasonable probability the jury would have reached a more favorable verdict if the court had given the instruction. (See *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*); *People v. Mackey* (2015) 233 Cal.App.4th 32, 109 [instructional error regarding CALCRIM No. 305 is evaluated under the “*Watson* standard of prejudice”]; *People v. Larsen* (2012) 205 Cal.App.4th 810, 830 [“‘wrongly omitted instructions that do not amount to federal constitutional error are reviewed under the harmless error standard articulated’ in *Watson*”]; see also *People v. Mayo* (2006) 140 Cal.App.4th 535, 539 [any error in failing to give CALJIC No. 2.90 was harmless].)

The evidence was overwhelming, apart from Phillips’s statement to Officer Vander Lee, that the apartment contained cocaine, and that Brim knew it. Multiple police

officers saw what appeared to be cocaine, and test results confirmed that it was. Officer Moreno observed Brim standing next to the display of rock cocaine on the cutting board. Officers found a razor blade used to cut cocaine and scales used to weigh cocaine. There was testimony that Walters let Brim use the apartment to sell drugs. The presence of the cutting board and pieces of metal in or near holes drilled in the floor were consistent with the way cocaine sales were transacted in Nickerson Gardens. And the officers saw Brim run upstairs to the bathroom, a place where he could hide from police and dispose of incriminating evidence, which supported an inference that Brim knew there was cocaine in the apartment. When Phillips told Officer Vander Lee there was cocaine in the unit, he was only confirming the obvious. (See *People v. Covarrubias* (2015) 236 Cal.App.4th 942, 954 [overwhelming evidence of guilt renders instructional error harmless].)

C. *The Trial Court Erred by Not Staying Execution of Sentence on Count 2 and Count 5*

Brim argues that the trial court erred by failing to stay, pursuant to section 654, execution of his sentences on counts 2 and 5. The People concede, and we agree, Brim is right on count 5. We conclude he is also right on count 2.

Section 654 prohibits separate punishment for multiple offenses arising from the same act or from a series of acts constituting an indivisible course of criminal conduct (*People v. Capistrano* (2014) 59 Cal.4th 830, 885), in order to ensure that a defendant's punishment is commensurate with his or her culpability (*People v. Correa* (2012) 54 Cal.4th 331, 341). When section 654 applies, "rather than dismissing charges or imposing concurrent sentences . . . it is necessary to *impose* sentence but to stay the *execution* of the duplicative sentence." (*People v. Duff* (2010) 50 Cal.4th 787, 796; see *People v. Jones* (2012) 54 Cal.4th 350, 353 ["the accepted 'procedure is to sentence defendant for each count and stay execution of sentence on certain of the convictions to which section 654 is applicable'"].) "Staying the execution of a sentence is a procedural device that allows trial courts to comply with section 654 without risking the possibility that a defendant will escape punishment if the count which carries the greater term of

imprisonment is reversed or vacated on appeal. [Citation.] The stay is necessarily contingent upon the defendant's completion of the sentence imposed for the greater offense.” (*People v. Rojas* (2015) 237 Cal.App.4th 1298, 1309.)

“Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the *intent and objective* of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.” (*People v. Rodriguez* (2009) 47 Cal.4th 501, 507.) “It is [the] defendant’s intent and objective, not temporal proximity of his offenses, which determine whether the transaction is indivisible.” [Citation.] “The defendant’s intent and objectives are factual questions for the trial court; [to permit multiple punishments,] there must be evidence to support [the] finding the defendant formed a separate intent and objective for each offense for which he was sentenced.”” (*People v. Capistrano, supra*, 59 Cal.4th at p. 886.) We will uphold the trial court’s express or (as here) implied determination that two crimes involved separate intents or objectives if supported by substantial evidence. (*People v. Brents* (2012) 53 Cal.4th 599, 618.)

Brim argues, the People concede, and we agree, that Brim cannot be separately punished for his convictions on count 1, possession for sale of a controlled substance while armed with a firearm, and count 5, possession of a firearm by a felon. (See *People v. Jones, supra*, 54 Cal.4th at p. 357 [“a single possession or carrying of a single firearm on a single occasion may be punished only once under section 654”]; *People v. Williams, supra*, 170 Cal.App.4th at pp. 645-646 [trial court should have stayed punishment on conviction for possession of a firearm by a felon because the court also punished the defendant for possession of a controlled substance while armed, and both counts involved “the same act and intent”].) The trial court should have stayed execution of sentence on count 5.

Brim also argues, but the People dispute, that the trial court erred in punishing him for his convictions on count 2, possession of a controlled substance for sale, and count 1, possession of a controlled substance while armed. We agree with Brim. There was no

evidence that Brim was armed with a firearm for any purpose or with any intent other than selling cocaine. (Cf. *People v. Vang* (2010) 184 Cal.App.4th 912, 917 [where the defendant “testified that he lived in a high crime area and used the surveillance system because he was afraid of break-ins,” “[t]he court could reasonably conclude that defendant possessed the firearm to both conduct his drug business and to protect his home in a high crime area”].) There was no evidence from which the trial court could infer that Brim formed a separate intent and objective for the two crimes. Brim’s possession of cocaine for sale while armed with a loaded firearm was one indivisible course of conduct and one criminal act that the trial court under section 654 could punish only once. The trial court also should have stayed execution of sentence on count 2.

DISPOSITION

The judgment is modified to stay execution of sentence on count 2, possession for sale of a controlled substance, and count 5, possession of a firearm by a felon. As modified, the judgment is affirmed. The superior court is directed to prepare a corrected abstract of judgment and forward it to the Department of Corrections and Rehabilitation.

SEGAL, J.

We concur:

PERLUSS, P. J.

ZELON, J.